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June 30, 2000

Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth Street, S.W., TW-A325

Re: Written *Ex Parte* Submission: Docket WT 99-263
Wireless Consumers Alliance Petition for Declaratory Ruling

Dear Ms. Salas:

Pursuant to 47 C.F.R. § 1.1206(b), please find enclosed for filing in the record in this proceeding the original and two copies of the Ex Parte Comments of SBC Wireless, Inc., which Ex Parte Comments have also been delivered by hand to the FCC Commissioners and the Commission officials set forth in the Certificate of Service to the Ex Parte Comments.

If you have any questions regarding this submission, please contact me at the above address or telephone number.

Sincerely,

William E. Cook, Jr.

Enclosures

EX PARTE OR LATE FILED

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of the Wireless Consumers Alliance, Inc. for a Declaratory Ruling on Communications Act Provisions and FCC Jurisdiction Regarding Preemption of State Courts from Awarding Monetary Damages Against Commercial Mobile Radio Service Providers for Violation of Consumer Protection or Other State Laws	)	WT Docket No. 99-263

To: THE COMMISSION

EX PARTE COMMENTS OF SBC WIRELESS, INC.

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June 30, 2000

SUMMARY

SBC Wireless, Inc. ("SBCW") hereby files these Ex Parte Comments to make the Commission aware of two recent court decisions that directly bear on the above-captioned matter and in further opposition to the Petition of the Wireless Consumers Alliance, Inc. ("WCA") in this proceeding.

In Bastien v. AT&T Wireless Services, Inc., the U.S. Court of Appeals for the Seventh Circuit held that a state law claim alleging breach of contract and consumer fraud against a cellular provider was preempted by Section 332(c)(3)(A) of the Communications Act. 205 F.3d 983, 986-87 (7th Cir. 2000). More recently, in Ball v. GTE Mobilnet of California, No. C031783, 2000 WL 739415 (Cal. Ct. App. June 8, 2000), a California appellate court preempted plaintiffs' "unfair or unlawful business practices" claims with respect to the cellular provider's billing for "non-communications time" (for the period after the Commission preempted rate regulation by the state). With respect to the plaintiff's claims based on nondisclosure and misrepresentation, the court suggested that injunctive relief might be appropriate, but termed as, among other things, "problematic" any claim for monetary damages; hence, the court's decision left open the issue of whether plaintiffs' damage claims are preempted by Section 332(c)(3)(A). Bastien and Ball provide further compelling reasons why the Commission should deny WCA's petition.

Moreover, the CMRS marketplace has undergone dramatic changes which the Commission has encouraged. There have been a number of major wireless consolidations that the Commission has recently approved which are driven by customer demands for both nationwide pricing and nationwide service, and the Commission has

found that it serves the public interest for a CMRS provider to establish a nationwide footprint and to provide nationwide services at nationwide rates. Customers are also insisting on consistent service features on a nationwide basis for both voice and data services. In approving consolidations in the wireless industry, the Commission has repeatedly stated that such national plans and service substantially benefit consumers and are procompetitive. The grant of the WCA Petition would undermine these developments by permitting courts – in the guise of damage awards – to engage in state-by-state ratemaking, thereby undermining the national rate plans wireless providers are establishing in response to consumer demand and in violation of Section 332(c)(3)(A)'s prohibition on such rate regulation by the states.

SBCW agrees with WCA regarding the urgent need for the Commission to resolve the issues raised in the WCA Petition. The scope of the problem is clear. It is beyond dispute that there have been – and are still pending – a large number of lawsuits raising state law false advertising, fraud and other claims for damages. It is time for the Commission to provide guidance to the CMRS industry, consumers and the courts by denying the WCA Petition and reaffirming that damages awards based on state law claims (as they relate to rates charged) are preempted by Section 332(c)(3) of the Communications Act.

Contrary to the assertions by WCA, the denial of the WCA Petition will not leave CMRS customers without a remedy. To the contrary, as intended by Congress, CMRS customers may seek damage remedies under federal law before the federal courts or the Commission.

While plaintiffs' attorneys might prefer to pursue their damage claims as they relate to rates charged in a state court or pursuant to state law, Congress eliminated such an option by enacting Section 332(c)(3)(A). The Commission, therefore, must deny the WCA Petition and clarify that damages awards (as they relate – directly or indirectly – to rates charged) against CMRS providers are preempted by Section 332(c)(3)(A) of the Communications Act.

TABLE OF CONTENTS

APPENDICES

APPENDIX A

Petition of Southwestern Bell Mobile Systems, Inc. for a Declaratory Ruling, File No. 97-31 (filed Nov. 12, 1997).

APPENDIX B

Reply Comments of Southwestern Bell Mobile Systems, Inc., File No. 97-31 (filed Jan. 23, 1998)

APPENDIX C

Bastien v. AT&T Wireless Services, Inc., 205 F.3d 983, 986-87 (7th Cir. 2000).

APPENDIX D

Ball v. GTE Mobilnet of California, 2000 WL 739415 (Cal. Ct. App. June 8, 2000).

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Petition of the Wireless Consumers Alliance, Inc. for a Declaratory Ruling on Communications Act Provisions and FCC Jurisdiction Regarding Preemption of State Courts from Awarding Monetary Damages Against Commercial Mobile Radio Service Providers for Violation of Consumer Protection or Other State Laws	)	WT Docket No. 99-263

To: THE COMMISSION

EX PARTE COMMENTS OF SBC WIRELESS, INC.

SBC Wireless, Inc. ("SBCW") hereby files these Ex Parte Comments to make the Commission aware of two recent court decisions that directly bear on the above-captioned matter and in further opposition to the Petition of the Wireless Consumers Alliance, Inc. ("WCA") for a declaratory ruling that the Communications Act of 1934 does not preempt state courts from awarding monetary relief against commercial mobile radio service ("CMRS") providers. In light of the recent court decisions, the consumer-driven trend in the CMRS industry of single-rate national plans, and other reasons, all of which are discussed below, WCA's petition should be denied.

INTRODUCTION

I. BACKGROUND OF PROCEEDING

On July 16, 1999, WCA filed with the Commission a petition for declaratory ruling requesting the Commission to rule that

> "neither the provisions of the Communications Act of 1934 . . ., nor the FCC's jurisdiction thereunder, serve to preempt state courts from awarding monetary relief against commercial mobile radio service . . . providers for (a) violating state consumer protection laws prohibiting, inter alia, false advertising and other fraudulent business practices, and/or (b) wrongful conduct in the context of contractual disputes and tort actions adjudicated under state contract and tort laws."[1]

Prior to the date of the WCA Petition, Southwestern Bell Mobile Systems, Inc., a subsidiary of SBCW, had filed with the Commission, on November 12, 1997, a petition for declaratory ruling that, among other rulings: (i) "challenges to the 'rates charged' to end users by a CMRS provider, including charges for incoming calls and charges in whole-minute increments, are exclusively governed by federal law under Section 332(c)(3) of the Communications Act, 47 U.S.C. § 332(c)(3)" and (ii) "state-law claims directly or indirectly challenging the 'rates charged' by CMRS providers are barred by Section 332(c)(3)."[2] In a November 24, 1999, Memorandum Opinion and Order, the Commission resolved several of the issues presented in the SBMS Petition. The Commission, however, declined to address "whether, and in what circumstance, damages

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[1] Petition of the Wireless Consumers Alliance, Inc. for a Declaratory Ruling, WT Dkt. No. 99-263 at 1 (filed July 16, 1999) ("WCA Petition").

[2] Petition of Southwestern Bell Mobile Systems, Inc. for a Declaratory Ruling, File No. 97-31, at 3-4 (filed November 12, 1997) ("SBMS Petition"). A copy of the SBMS

[Footnote continued on next page]

awards against CMRS providers are preempted by Section 332(c)(3) of the Communications Act," and instead incorporated the consideration of that issue, along with the SBMS Petition and comments filed in the SBMS proceeding, into this proceeding. ("SBMS Order"). The SBMS Petition and other comments in the SBMS proceeding were filed by the Wireless Telecommunications Bureau's Policy Division as part of this proceeding on February 18, 2000.[3]

II. RECENT COURT DECISIONS BEARING ON PROCEEDING

SBCW is filing these Ex Parte Comments to make the Commission aware of two recent decisions that directly bear on the WCA petition. In Bastien v. AT&T Wireless Services, Inc., the U.S. Court of Appeals for the Seventh Circuit held that a state law claim alleging breach of contract and consumer fraud against a cellular provider was preempted by section 332(c)(3)(A). 205 F.3d 983, 986-87 (7th Cir. 2000) (A copy of this decision is attached at Appendix C). In the complaint, plaintiff claimed that the cellular provider signed up subscribers without first building the cellular towers and other infrastructure necessary to provide reliable cellular connections, with the result that a large proportion of attempts to place calls were unsuccessful, and that the cellular provider nevertheless continued to market and sell its telephones and service without regard to the fact that it knew that it could not deliver what it was promising. Id. at 984. As in this proceeding, rather than directly attacking a cellular provider's rates, the Bastien

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[Footnote continued from previous page]
Petition and SBMS's reply comments in the proceeding are located at Appendices A & B.

[3] Memorandum of the WTB's Policy Division (filed Feb. 18, 2000).

plaintiffs styled their claims as state law consumer fraud and breach of contract claims.[4] The Seventh Circuit, however, recognized the claims for what they really were – an indirect attack on the cellular provider's rates: "As the Supreme Court recognized in Central Office Telephone, a complaint that service quality is poor is really an attack on the rates charged for the service and may be treated as a federal case regardless of whether the issue was framed in terms of state law." Bastien, 205 F.3d at 988.

More recently, on June 8, 2000, a California appellate court issued a decision that directly bears on the WCA Petition. Ball v. GTE Mobilnet of California, No. C031783, 2000 WL 739415 (Cal. Ct. App. June 8, 2000) (A copy of the case is attached at Appendix D). In this case, the court preempted plaintiff's "unfair or unlawful business practices" claims with respect to the cellular provider's billing for "non-communications time" (for the period after the Commission preempted rate regulation by the state). With respect to such claims, the plaintiffs sought "restitution of all amounts overpaid by [them] and other members of the general public . . . as a result of the aforesaid unfair business act or practice." Id. at *4 (alterations in the original). Plaintiffs argued that their claims "are subject to state law as mere 'billing practices,'" and that "the time component of the airtime charged has absolutely nothing to do with the rate charged."

The court recognized the restitution claims for what they really were, an indirect effort to regulate rates: "We beg to differ. As the defendants point out, this distinction between rate and time is nonsensical because the rate charged for wireless service

[4] Similarly, the catalyst for the WCA Petition is a class action lawsuit against LA Cellular Telephone Company, which WCA alleges has "engaged in fraudulent business practices involving, inter alia, a false and deceptive advertising campaign conducted by LA Cellular for over a decade." WCA Petition at 3.

includes both price and time." Id. at *6 (emphasis added). The court concluded that section 332(c)(3)(A) preempted such claims for the period after August 7, 1995, which was the date "section 332(c)(3)(A) became effective in California after the FCC denied California's petition to retain regulatory authority over cellular rates." Id. at *8. Hence, the decision left undisputed the preemptive effect of Section 332.

In addition, the court remanded to the trial court the plaintiffs' claim based on the allegation that defendants concealed, inadequately disclosed or misrepresented the particular charges that plaintiffs' challenge." Id. at *10. While the court permitted the disclosure claim to proceed, it suggested that injunctive relief might be appropriate, but termed as, among other things, "problematic" any claim for monetary damage:

> Through their generically-phrased injunction requests, plaintiffs could seek either full disclosure of the challenged charges or to enjoin these charges pending full disclosure. . . . The plaintiff's generically phrased *restitution requests* could be justified on the basis of nondisclosure too, though this *may be more problematic*. . . .
>
> In any event plaintiffs have alleged a sufficient state law basis for an action (nondisclosure as an unfair or unlawful business practice under Business & Professions Code section 17200 et seq.) and a sufficient remedy as part of that action (injunctive relief and *perhaps* monetary relief as well.)

Id. at *10-11 (emphasis added) (citation omitted). Hence, the court decision left open the issue of whether plaintiffs' damage claims are preempted by Section 332(c)(3)(A).

Bastien and Ball provide a further compelling reason why the Commission should deny WCA's petition and grant SBCW's request for a declaratory ruling that state law damage awards against CMRS providers (for actions related to the rates charged for service) are preempted by Section 332(c)(3)(A) of the Communications Act. Bastien makes clear that such damage awards are preempted. The Ball court's decision to remand, rather than squarely address the preemption issue with regard to plaintiff's

disclosure claims, indicates the need for the Commission to provide guidance to the courts by making clear that such damages claims are preempted.

III. CHANGES IN THE CMRS MARKETPLACE

Since the filing of the WCA Petition and SBMS Petition, the CMRS marketplace has undergone dramatic changes which the Commission has encouraged. A number of major wireless consolidations that the Commission has recently approved are driven by customer demands that are fundamentally changing the market for wireless services. In particular, the demand for single rate, nationwide pricing plans is unmistakable, and the Commission has found that it serves the public interest for a CMRS provider to establish a nationwide footprint and to provide nationwide services at nationwide rates. For example, AT&T's single rate plan attracted a million new customers in 1999,[5] and all of the other national carriers are offering like plans. Customers are also insisting on consistent service features on a nationwide basis for both voice and data services. Five major carriers now have the near national, facilities-based footprint needed to meet these demands. For example, both Nextel and Verizon Wireless serve 96 of the top 100 markets, and Verizon's footprint covers 232 million people. Sprint PCS's authorizations cover approximately 270 million people in all 50 states, while AT&T and its partners have licenses covering 94% of the U.S. population. VoiceStream now possesses licenses that cover a population greater than 220 million people.

Meeting customer demands for both nationwide pricing and nationwide service requires a national footprint. The Commission has recently found, in approving the transactions involving Bell Atlantic/Vodafone/AirTouch and

VoiceStream/Omnipoint/Aerial, that the creation of a CMRS competitor with a national footprint substantially benefits consumers and is procompetitive.

The grant of the WCA Petition would undermine these developments by permitting courts – in the guise of damage awards – to engage in state-by-state ratemaking, thereby undermining the national rate plans wireless providers are establishing in response to consumer demand and in violation of Section 332(c)(3)(A)'s prohibition on such rate regulation by the states.

* * * * *

SBCW agrees with WCA regarding the urgent need for the Commission to resolve the issues raised in the WCA Petition.[6] The scope of the problem is clear. It is beyond dispute that there have been – and are still pending -- a large number of lawsuits raising state law false advertising, fraud and other claims for damages. We have noted below a number of cases which make clear that damages awards based on such state law claims are preempted by Section 332(c)(3). The Ball court simply termed the issue of monetary relief as "problematic," thereby leaving open the issue of whether monetary awards are ever permissible under Section 332(c)(3). WCA, on the other hand, points to cases in which it alleges that courts have concluded that such damage claims are not preempted. Rather than engaging in a point-by-point rebuttal of the cases cited by WCA below – the majority of which do not specifically address whether Section 332(c)(3)

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[5] See AT&T Corp., SEC Form S-3, Amendment 1 at 39 (filed Mar. 28, 2000) ("AT&T S-3").

[6] In fact, as noted above, SBMS requested the Commission to address these very issues in the SBMS Proceeding.

preempts damage awards[7] – SBCW simply notes that the different results courts have reached point to the need for certainty, which the Commission can give by denying the WCA Petition and granting the relief SBMS sought in the SBMS Proceeding – namely, a declaratory ruling that state law damages awards (as they relate – directly or indirectly – to rates charged) are preempted by Section 332(c)(3) of the Communications Act.

In recent ex parte filings, WCA has urged the Commission to adopt a "bright line ruling on the petition so as to provide as much guidance to the courts as possible."[8] We agree that there is the need for a "bright line' rule, but the only one permitted by Section 332(c)(3)(A) – a direct and simple statement that damage awards relating to the rates charged for CMRS service are preempted. Any other rule would be prohibited by Section 332(c)(3)(A), would only exacerbate the current confusion in the courts over this issue, and would result in a plethora of new lawsuits by creative plaintiffs' attorneys. Likewise, attempting to discuss hypothetical scenarios beyond the instant case would likely result in creative drafting exercises by plaintiffs' counsel in attempting to mirror favorable hypotheticals and a steady stream of requests to the Commission for further guidance.

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[7] Most of the cited cases deal with the issue of whether Section 332(c) completely preempts state regulation of CMRS. See, e.g., Bennett v. Alltel Communications of Alabama, No. Civ. 96-D-232-N, 1996 WL 1054301 at *5 n. 14 (M.D. Ala. May 14, 1996) (holding that section 332(c) does not completely preempt the "whole field" of CMRS regulation).

[8] E.g., Memorandum from Kenneth E. Hardman, Counsel for WCA, to Magalie Roman Salas, FCC Secretary (dated June 16, 2000).

ARGUMENT

I. STATE LAW DAMAGE AWARDS (AS THEY RELATE TO RATES CHARGED) ARE PREEMPTED BY SECTION 332(C)(3)(A) OF THE COMMUNICATIONS ACT

A. State Law Damage Awards (As They Relate to Rates Charged) Violate Section 332(c)(3)(A)'s Prohibition on State Regulation of Rates

Bastien is the latest in a long line of federal and state court decisions, as well as FCC decisions, that Section 332(c)(3)(A) of the Communications Act bars state regulation of the rates charged for the provision of CMRS service.[9] Even WCA appears to acknowledge this fact.[10]

What is contested by WCA, but what seems settled by many courts, is that the award of damages related to the charges for CMRS services is tantamount to the

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[9] For Commission statements, see, e.g., Second Report and Order, In re Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services, 9 FCC Rcd. 1411, ¶ 12 (1994) (OBRA, enacting Section 332, "preempt[s] state regulation of entry and rates for both CMRS and PMRS providers"), reconsideration granted in part, 10 FCC Rcd. 7824 (1995), reconsideration denied, 11 FCC Rcd. 19729 (1996); Report and Order, In re Petition of the State of Ohio for Authority to Continue to Regulate Commercial Mobile Radio Services, 10 FCC Rcd. 7842, ¶ 8 (1995) (Section 332(c)(3)(A) "express[es] an unambiguous congressional intent to foreclose state regulation in the first instance"), recon. denied, 10 FCC Rcd. 12427 (1995).

For court statements, see, e.g., Connecticut Dep't of Pub. Util. Control v. FCC, 78 F.3d 842, 846 (2d Cir. 1996) (in Section 332(c)(3), "Congress provided a general preemption of state [CMRS] regulation"); In re Topeka SMSA Ltd. Partnership, 917 P.2d 827, 832 (Kan. 1996) (Section 332(c)(3) "preempts state or local regulation of the rates charged by any provider of CMRS").

[10] *See, e.g.*, WCA Petition at 4 ("Congress' purpose in enacting Sections 332 ... was to enable the forces of a free, fair and robustly competitive marketplace — *as opposed to state rate regulation* — to determine the prices charged by CMRS providers") (emphasis added).

regulation of the charges for the service or good itself.[11] In similar circumstances, the Supreme Court has also indicated that the award of such damages would amount to state regulation of rates. In Arkansas Louisiana Gas Co. v. Hall ("Arkla"),[12] which involved a breach of contract claim regarding the purchase of federally rate-regulated natural gas, the Supreme Court agreed that "[n]o matter how the ruling of the Louisiana Supreme Court [granting damages] may be characterized, . . . it amounts to nothing less than the award of a retroactive rate increase. . . ."[13]

The prohibited ratemaking effects of such damage awards are exacerbated in class actions which may result in both a retroactive rate decrease for all of the provider's customers and a lasting change in the provider's rate structure. Section 332(c)(3)(A) does not intend that states take actions that have such a broad-ranging impacts on rates.

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[11] E.g., In re Comcast Cellular Telecomm. Litig., 949 F. Supp. 1193, 1204 (E.D. Pa. 1996) ("a state court would be prevented from giving Plaintiffs the remedies they seek [including compensatory damages and an injunction against billing for non-communication time] without engaging in regulation of the rates of a CMRS provider"), aff'd, 138 F.3d 46 (2d Cir. 1998); Marcus v. AT&T Corp., 938 F. Supp. 1158, 1171 (S.D.N.Y. 1996) (in invoking filed rate doctrine, stating that "to require [defendant IXC] to pay damages here would mean that these plaintiffs . . . are entitled to a reduced rate . . ."), aff'd, 138 F.3d 46 (2d Cir. 1998).

[12] 453 U.S. 571 (1981).

[13] Id. at 578. See also id. at 584. The Court added that "the mere fact that respondents brought this suit under state law would not rescue it, for when [C]ongress has established an exclusive form of regulation, 'there can be no divided authority over interstate commerce.'" Id. at 580.

Arkla has been invoked to reject a wide variety of state law claims. For example, in Southern Union Co. v. FERC, 857 F.2d 812 (D.C. Cir. 1988), the D.C. Circuit invoked Arkla to reject FERC's decision that damages could be awarded for fraud and negligent misrepresentation claims related to prices for federally regulated gas. The court said that "the state measure of damages is based upon, and has the effect of awarding, a price for interstate gas that, to the extent that price exceeds federal guidelines, the state court has

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One obvious reason a court would be engaged in prohibited rate regulation by awarding damages based on a state law claim is that the court would have to determine what a reasonable rate would have been in order to calculate damages – a determination involving the court directly in ratemaking.[14] The court in Wegoland Ltd. v. NYNEX Corp., a fraud-related claim challenging the rates of several telephone companies, for example, held that a determination of damages would entwine the court in a calculation of the reasonableness of those rates. The court "recognize[d] that plaintiffs are seeking an award of damages that does not explicitly ask the court to determine reasonable rates. However, like the Eighth Circuit, I believe that such an award would effectively require determining what a reasonable rate would have been."[15] Several other courts have come

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no power to award," id. at 818, because it had no power to award a retroactive rate increase.

[14] Moreover, such awards could be impossible to calculate if the carrier's billing system does not record the data needed to determine the amount that would have been charged under such a "reasonable rate." For example, if the carrier did not keep records as to exactly how many seconds each call lasted (which it would have no reason to keep if it rounded up), it would be impossible to calculate what "should" have been assessed if a court were to decide that billing on a per second basis was the appropriate rate.

[15] 806 F. Supp. 1112, 1121-22 (S.D.N.Y. 1992), aff'd, 27 F.3d 17 (2d Cir. 1994)..

In affirming the lower court's decision, the Second Circuit agreed with this analysis. It said:

> The plaintiffs respond that courts would not be required to determine a "reasonable" rate, but rather would only have to decide what damages arose from the fraud, a task courts routinely undertake. However, the two are hopelessly intertwined: "The fact that the remedy sought can be characterized as damages for fraud does not negate the fact that the court would be determining the reasonableness of rates" and that "any attempt to determine what part of the rate previously deemed reasonable was a result of the fraudulent acts would require determining what rate would have been deemed reasonable absent the fraudulent acts, and then finding the difference between the two."

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to similar conclusions.[16] The determination (and retroactive setting) of a reasonable rate would engage state law in exactly the type of CMRS rate regulation prohibited by Section 332(c)(3)(A).

Similarly, injunctions restricting the practices of CMRS providers also may necessarily involve state law in the determination of whether the carrier may charge for a service on a going-forward basis and how much it may charge. For instance, plaintiff's might seek an injunction the effect of which would be to prohibit a CMRS provider from rounding up rates.[17] Such claims – no matter if they are framed as breach of contract, fraud, or otherwise – are state intrusions on the exclusive authority of the Commission to regulate the rates charged to customers by CMRS providers. Moreover, they run a high risk of creating inconsistent and competition-limiting CMRS regulation, a possibility Congress sought to avoid in enacting Section 332(c)(3)(A). Thus, such claims should be prohibited.

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Wegoland Ltd, 27 F.3d at 21 (citations omitted).

[16] See, e.g., H.J., Inc. v. Northwestern Bell Tel. Co., 954 F.2d 485, 493-94 (8th Cir. 1992), cert. denied, 504 U.S. 957; Birnbaum v. Sprint Communications Corp., No. 96-CV-2514(ARR)(CLP), 1996 WL 897326, *5 (E.D.N.Y. Nov. 19, 1996) (attempt to enforce superseded tariff would require court "to make a determination that the Original Tariff constitutes a reasonable rate").

[17] States courts, of course, would retain the authority to enjoin actions by CMRS providers, so long as such judicial action does not impact, directly or indirectly, the rates charged for services. A court, for instance, would retain the right to enjoin advertisements that are false or misleading, but would not have the right to enjoin the rates charged for the services set forth in the advertisement. SBCW does not challenge the authority Section 332(c)(3)(A) grants states over "other terms and conditions" of CMRS services, except to the extent such state regulation directly or indirectly relates to the rates charged for such services.

B. Form of Action Irrelevant In Determining Section 332(c)(3)(A) Violation

It is of no consequence if the state law claim challenging the CMRS provider's charges is labeled a claim for breach of contract, unfair trade practices, or the like – rather than as a direct challenge to the rates themselves. As the Supreme Court and other courts have indicated,[18] the real question is whether the true targets of these claims are the rates charged themselves. In Bastien, for example, the Seventh Circuit stated that it "[would] not be bound by the names and labels placed on a complaint by the plaintiff when the complaint in fact raises a federal question," and "a complaint that service quality is poor is really an attack on the rates charged for the service and may be treated as a federal case regardless of whether the issue was framed in terms of state law." Bastien, 205 F.3d at 987-88.

The claims against LA Cellular described in the WCA Petition are strikingly similar to those raised in Bastien,[19] and for the same reasons are preempted by Section 332(c)(3)(A). In Bastien, for example, plaintiff complained that the cellular provider "signed up subscribers without first building the cellular towers and other infrastructure necessary to provide reliable cellular connections," and "nevertheless continued marketing and selling its telephones and telephone service, without regard to the fact that it knew that it could not deliver what it was promising." Id. at 985. Similarly, WCA

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[18] E.g., AT&T Corp. v. Central Office Telephone, Inc., 524 U.S. 214, 215 (1998) (state contract and tort claims challenging service and billing options preempted; "Any claim for excessive rates can be couched as a claim for inadequate services and visa versa.").

[19] WCA stated that "allegations of false advertising and other fraudulent business practices against a CMRS provider, Los Angeles Cellular Telephone Company" are raised in a California court in a matter styled as Spielholz v. Los Angeles Cellular Telephone Co., No. BC186787. See WCA Petition at 3-4.

alleges that "LA Cellular's representations about its calling area are inaccurate, misleading and intentionally deceptive because there are undisclosed gaps, holes or 'dead zones' in LA Cellular's advertised coverage area." WCA Petition at 7.

If the Commission does not foreclose such avenues for challenges to CMRS rates, it will simply be allowing plaintiffs to manipulate pleading devices to circumvent the prohibition on state regulation of rates under Section 332(c)(3)(A).

C. Prohibition on Rate Regulation Under Section 332(c)(3)(A) Is Not Dependent on Whether CMSR Providers Rates Are Tariffed

WCA incorrectly claims that damages claims are not barred where CMRS providers are not subject to rate regulation or are not required to file tariffs (i.e., the so-called "filed tariff" defense).[20] This argument completely misreads Section 332(c)(3). Section 332(c)(3) plainly states that "no State or local government shall have *any* authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service . . ." 47 U.S.C. § 332(c)(3)(A) (emphasis added). This language is crystal clear. Nothing in the language suggests that states may nonetheless regulate rates if the Commission chooses not to regulate rates or require tariffs. In any event, a decision by the Commission to forbear from rate regulation is itself a rate regulation decision over which the Commission has exclusive jurisdiction under Section 332(c)(3).

Nevertheless, WCA erroneously implies that the cases cellular providers cite in support of preemption of damage awards are invalid because those cases involve the

[20] WCA Petition at 13.

"filed rate doctrine."[21] Bastien, however, is not such a case. Moreover, WCA misrepresents the purpose for which the "filed rate doctrine" cases are cited. SBCW and other cellular providers do not contend that the "filed rate doctrine" applies to CMRS rates.[22] The importance of the "filed rate doctrine" cases is that they make clear that damage awards are an indirect attempt to regulate rates. The cases are instructive in that they demonstrate how damages awards are tantamount to rate regulation. Similarly, state law damages awards against CMRS providers amount to rate regulation. However, it is the clear language of Section 332(c)(3)(A) -- not the "filed rate doctrine" – that prohibits courts from granting such awards as they relate to rates charged for service. Thus, the Commission should reject the "filed rate doctrine" argument set forth in the WCA Petition.

D. Savings Clause Does not Permit Damage Awards

WCA argues that the Communications Act's "savings clause" under Section 414 of the Communications Act preserves its state law-based claims, notwithstanding Section 332(c)(3).[23] This attempted reliance on the clause is misplaced.

Although Section 414 of the Act preserves certain state law actions in certain situations, the courts have been virtually unanimous in holding that the actions preserved must not conflict with the provisions of the Act. For example, as one federal district

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[21] In such cases, courts held that they could not award damages because the filed rate doctrine barred the courts from effecting a change in certain telephone rates and the damage awards sought effected just such a change in rates.

[22] In fact, as noted above, the filed rate doctrine is absolutely irrelevant since Section 332(c)(3)(A) prohibits rate regulation by states, regardless of whether rates are tariffed

[23] WCA Petition at 14-16 .

court stated, the savings clause preserves only those "[s]tate law remedies which do not interfere with the Federal Government's authority over interstate telephone charges or services, and which do not otherwise conflict with an express provision of the [Communications] Act."[24] In the LA Cellular Case and those like it, however, the state law claims conflict with the express preemption provision of Section 332(c)(3). In fact, Bastien ruled that Section 332(c)(3) preemption governs, notwithstanding the savings clause. The court said that "[t]o read the clause expansively would abrogate the very federal regulation of mobile telephone providers that the act intended to create."[25] In effect, the reading WCA suggests would lead to the impermissible result of allowing "[a] general remedies savings clause . . . to supersede [a] specific substantive pre-emption provision."[26] Moreover, it is paradoxical at best to argue that what Section 332(c)(3) specifically takes away, Section 414, enacted 50 years earlier, gives back. The Commission should reject the WCA savings clause argument.

Similarly, the "other terms and conditions" clause under Section 332(c)(3)(A) does not permit damage claims as they relate to rates charged for service. The term "*other* terms and conditions" means only those terms and conditions that do not involve rate regulation or the entry of CMRS providers. As set forth above, damages awards

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[24] MCI Telecomm. Corp. v. Graphnet, Inc., 881 F. Supp. 126, 131 (D.N.J. 1995).

[25] Bastien, 205 F.3d at 987.

[26] Carstensen v. Brunswick Corp., 49 F.3d 430, 432 (8th Cir. 1995) (quoting Morales v. Trans World Airlines, Inc., 504 U.S. 374, 385 (1992)), cert. denied, 116 S. Ct. 182 (1995).

clearly impact rates. Moreover, the Commission has made clear that this clause only permits state regulation "separate and apart from [CMRS] rates."[27]

II. STATE LAW DOES NOT PROVIDE THE ONLY REMEDY FOR PLAINTIFFS; THE COMMISSION AND FEDERAL COURTS MAY RESOLVE DAMAGE CLAIMS PURSUANT TO FEDERAL LAW

WCA wrongly asserts that failure to grant the petition will "effectively immuniz[e] CMRS providers from liability in connection with their contravention of state consumer protection laws and/or for to [sic] breaches of contract and tortious conduct." WCA Petition at 2. To the contrary, CMRS customers may seek damage remedies under federal law before the federal courts or the Commission. Sections 201(b) and 202 of the Communications Act prohibits carriers from engaging in "practices" or imposing "charges" that are "unjust or unreasonable." 47 U.S.C. §§ 201(b), 202. Section 207 of the Communications Act permits plaintiffs to bring such claims for damages either before the Commission or "in any district court of the United States of competent jurisdiction," and Section 209 of the Act authorizes the Commission to grant such damages. 47 U.S.C. §§ 207, 209.

While plaintiffs' attorneys might prefer to pursue their damage claims (as they relate to rates charged) in a state court or pursuant to state law, Congress eliminated such an option by enacting Section 332(c)(3). The Commission, therefore, in its order denying the WCA Petition and as requested in the SBMS Petition, should declare that damages awards (as they relate – directly or indirectly – to rates charged) against CMRS providers are preempted by Section 332(c)(3).

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[27] In re Petition of the State of Ohio for Authority to Continue to Regulate CMRS, 10 FCC Rec. at 7842, 7852 ¶ 43 (May 19, 1995).

Contrary to assertions by WCA, such a declaration would not leave customers without a remedy under state laws for certain CMRS practices, and would not eliminate any role whatsoever for the state courts in enforcing CMRS contracts. WCA Petition at 17. As stated in the SBMS Petition, a "state may regulate . . . whether the correct CMRS rate was applied."[28] Thus, if a CMRS carrier charged rates at variance with the clearly enunciated and agreed-upon rate -- for example, the customer was charged 50 cents per minute while the rate for calls was to be billed at 25 cents per minute -- it might be appropriate (depending on other circumstances of the case) for a court to find a breach of contract and award damages. Similarly, if a CMRS provider's contract with a customer stated that CMRS would bill its customers on a per-second basis, and that each second would be billed at the same rate, and established a per-second rate -- and yet the CMRS provider still billed its customers on a rounded-up, per-minute basis -- judicial action might be warranted.

In such egregious, rare cases of fraud where the award of damages would and could not have an effect on rates, judicial action might not be preempted by Section 332(c)(3)(A). The Commission should make clear to courts, however, that the facts that would give rise to such an action would be extraordinarily rare and should urge the courts carefully to scrutinize such claims to ensure that no CMRS rate-regulation would be involved in their rulings.

Moreover, states retain authority under Section 332(c)(3)(A) to regulate "other terms and conditions of commercial mobile services." A state may still ensure that CMRS providers make accurate and authentic representations in their promotional

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[28] SBMS Petition at 14 n.26.

practices or prohibit dishonest promotions and deceptive marketing practices. States retain such authority, so long as they exercise such authority in a manner that does not impinge on "the entry of or the rates charged by" CMRS providers.

III. GRANT OF THE WCA PETITION WOULD THREATEN THE NATIONAL SINGLE-RATE PLANS DEMANDED BY CONSUMERS AND THE UNIFORM NATIONAL REGULATION INTENDED BY CONGRESS

SBCW agrees with WCA that "Congress' purpose in enacting Section 332 of the Communications Act was to enable the forces of a free, fair and robustly competitive market place" and that "[i]t was in order to foster robust competition among CMRS providers that the FCC elected to forbear from engaging in federal rate regulation of wireless services." WCA Petition at 4 and 16. However, SBCW disagrees with WCA's suggestion that state law damage award claims are consistent with such purpose.

In fact, the Commission should hold that state law damage claims relating to the rates charged are barred under Section 332(c)(3) since disparate state regulation of CMRS charges would undermine the Commission-endorsed advances the CMRS industry has made towards meeting the consumer-driven demand for nationwide single rate plans, and would frustrate the Congressional goal of creating a uniform regulatory structure for CMRS rates.

A. Grant of the Petition Would Be Inconsistent With the Consumer Driven Demand For National Single-Rate Plans

Since the filing of the SBMS Petition, there has been an increasing trend towards the creation of facilities-based wireless carriers with near-national footprints, and the Commission has found that it serves the public interest for a CMRS provider to establish a nationwide footprint and to provide nationwide services at nationwide rates. As shown

by the great success of single rate plans, wireless customers are demanding nationwide service at affordable rates. It will be difficult for carriers to continue to offer such rate plans, however, if courts – in the guise of damage awards pursuant to state law – are permitted to engage in state-by state rate regulation.

The Commission has specifically recognized that single rate national pricing plans serve the public interest. For example, in its order approving the merger of Bell Atlantic and Vodafone, the Commission stated: "We agree with Applicants that the creation of another nationwide wireless competitor constitutes a clear, transaction-specific public interest benefit." See In re Applications of Vodafone, AirTouch, Plc and Bell Atlantic Corp., *Memorandum Opinion and Order,* DA 99-2451, DA 00-721, 2000 WL 332670 ¶33 (2000). Similarly, in its Vanguard decision, the Commission stated:

> We find that this merger should accelerate AT&T's ability to provide expanded service coverage using its own facilities. This merger will fill in gaps in AT&T's operational footprint.... As a direct result, AT&T will likely incur lower costs through inter-firm payments associated with roaming by AT&T customers on other carriers' networks. This consideration is important to AT&T's effort to support its uniform nationwide pricing plans. We have observed that this initiative has eliminated roaming and long distance charges to the obvious benefit of affected subscribers. We conclude that, on balance, Applicants have demonstrated that these transfers serve the public interest.[29]

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[29] In re Applications of Vanguard Cellular Sys., Inc. and Winston, Inc., *Memorandum Opinion and Order*, 14 FCC Rcd. 3844, ¶ 24 (1999). Other Commission decisions approving the creation of regional cellular systems have confirmed the public benefits of expanded footprints. See, e.g., In re Application of 360° Communications Co. and ALLTEL Corp., *Memorandum Opinion and Order*, 14 FCC Rcd. 2005, ¶ 41 (1998); In re Applications for the Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Southern New England Telecomm. Corp. to SBC Communications

[Footnote continued on next page]

The public interest benefits of such national plans would be hampered – if not destroyed – by the grant of the WCA Petition. Disparate state regulation would significantly raise CMRS providers' operating costs by forcing them to create separate operational systems, such as for billing and switching, for each individual state.[30] A similar problem arises in those CMRS service areas which cover more than one state;[31] there, disparate state regulation would necessitate multiple operational systems and rate plans for the same system - not only increasing costs but potentially creating customer confusion over rates. Moreover, in such situations it may become impractical or impossible to follow different state regulations. The addition of these disparate and

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[Footnote continued from previous page]
Inc., *Memorandum Opinion and Order*, 13 FCC Rcd. 21292, ¶¶ 44-45 (1998) ("SBC/SNET"); In re Bell Atl. Mobile Sys., Inc. and NYNEX Mobile Communications Co., *Order*, 10 FCC Rcd. 13368, ¶¶ 45-46 (1995) (citing In re Application of Corpus Christi Cellular Tel. Co., *Memorandum Opinion and Order*, 3 FCC Rcd. 1889, ¶ 19 (1988) ("In addition to McCaw's public interest statement to the effect that regional systems . . . are in the public interest, such conclusion had previously been confirmed by the Commission, by the experience of large wireline operators and by McCaw's own experience in other regional clusters nationwide.")); see also In re Application of Madison Cellular Tel. Co., 2 FCC Rcd. 5397, ¶ 4 (1987).

[30] As the court in Comcast noted, "Virtually identical allegations to the ones contained in the complaint presently pending before this court were filed in state courts in Pennsylvania, Delaware and New Jersey creating the potential for three radically different determinations of Comcast's obligations to its customers regarding its rates and billing practices." In re Comcast Cellular Telecomm. Litig., 949 F. Supp. at 1204.

[31] This situation, of course, exists throughout the country. As a local example, SBCW's Cellular One system in the Washington/Baltimore area encompasses several states and the District of Columbia, combining 2 MSA licenses and 4 RSA licenses into a single CMRS system within which all rates charged and all customer care and operational characteristics are the same for all customers. In other areas, SBCW operates systems where a single MSA covers multiple states (e.g., the Kansas City MSA includes both Kansas and Missouri and the St. Louis MSA covers both Missouri and Illinois). While there are some minor zone-based rate plans within these various systems, the rates charged by SBCW are not tailored to the individual states in which the customers reside or in which they may be traveling.

burdensome regulatory costs to the provision of CMRS service will discourage the entry of new wireless providers and will also discourage or thwart the efficiency-producing and customer-service enhancing expansion of already existing CMRS providers across state borders.[32]

The grant of such petition, therefore, would not only be in violation of Section 332(c)(3)(A), but would be inconsistent with the public interest. Moreover, as described in the next section, the grant of the petition would be inconsistent with Congressional intent in enacting Section 332(c)(3)(A).

B. Grant of the Petition Would Be Inconsistent with Congressional Intent

As the House Report accompanying the bill creating Section 332(c)(3) states, the preemption provision was included in order "[t]o foster the growth and development of mobile services that, by their nature, operate without regard to state lines."[33]

This goal has been recognized by both the Commission and the courts. For example, the Commission has stated that "the legislative history of OBRA makes plain"

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[32] State regulation -- and inconsistent regulation among the states -- may also constitute regulation of CMRS entry prohibited by Section 332(c)(3)(A). The Commission itself has stated that regulation may constitute a barrier to entry. See Notice of Proposed Rulemaking, In re Decreased Regulation of Certain Basic Telecomm. Servs., 2 FCC Rcd. 645, ¶ 11 (1987) ("The presence of traditional regulation itself may be a significant entry barrier to a market that otherwise could operate efficiently on a highly competitive basis."). Furthermore, the D.C. Circuit has recognized that the burdens created by regulation may constitute a barrier to entry. See Southern Pacific Communications Co. v. American Tel. & Tel. Co., 740 F.2d 980, 1001 (D.C. Cir. 1984) ("the costs and delays of the regulatory process clearly constitute barriers to entry"). As noted above, conflicting state regulations regarding CMRS charges will make it more difficult and costly for CMRS providers to establish service -- thus making it more difficult for entry to occur. In fact, it may be difficult or impossible for a CMRS provider to even follow inconsistent state regulations. Thus, state court adjudications in this area constitute forbidden entry regulation under Section 332(c)(3)(A).

[33] H.R. Rep. No. 103-111, at 548 (1993).

that Congress' intention was for there to be "establish[ed] a national regulatory policy for CMRS, not a policy that is balkanized state-by-state."[34] A federal district court also recognized that "Congress preempted any state or local regulation of the rates charged by CMRS providers, thereby avoiding the potential that a myriad of conflicting regulations issued by states and localities could thwart the comprehensive regulatory scheme embodied in the Communications Act."[35]

In a related context involving the Interstate Commerce Commission -- where certain authority was granted by Congress solely to the I.C.C., the Supreme Court said that:

> It would vitiate the overarching congressional intent of creating "an efficient and nationally integrated railroad system" to permit the State of Iowa to use the threat of damages to require a carrier to do exactly what the Commission is empowered to excuse. A system under which each State could, through its courts, impose on railroad carriers its own version of reasonable service requirements could hardly be more at odds with the uniformity contemplated by Congress in enacting the Interstate Commerce Act.[36]

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[34] Report and Order, In re Petition of New York State Public Service Commission to Extend Rate Regulation, 10 FCC Rcd. 8187, ¶ 24 (1995). The Commission has also said that "by adopting Section 332(c)(3)(A) of the Act, [Congress] intended generally to preempt state and local rate and entry regulation of all commercial mobile radio services to ensure that similar services are accorded similar regulatory treatment and to avoid undue regulatory burdens, consistent with the public interest." Second Report and Order, In re Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services, 9 FCC Rcd. 1411, ¶ 250 (1994), reconsideration granted in part, 10 FCC Rcd. 7824 (1995), reconsideration denied, 11 FCC Rcd. 19729 (1996).

[35] In re Comcast Cellular Telecomm. Litig., 949 F. Supp. at 1204.

[36] Chicago and North Western Transportation Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 325-26 (1981) (citation omitted).

CONCLUSION

For all of the above reasons, the type of state law monetary relief sought by WCA would involve states in the regulation of the rates charged by CMRS providers, thereby intruding on the Commission's exclusive authority in this area in violation of Section 332(c)(3). Therefore, the Commission should deny the WCA Petition, and should grant the request in the SBMS Petition that the Commission declare that damages awards (as they relate – directly or indirectly – to rates charged) against CMRS providers are preempted by Section 332(c)(3) of the Communications Act.

Respectfully submitted,

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June 30, 2000

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I, William Cook, hereby certify that on this 30th day of June 2000, a copy of the foregoing Ex Parte Comments of SBC Wireless, Inc., has been served by hand delivery to the following persons:

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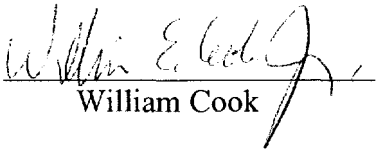

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